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In the

Supreme Court of the United States

No. [redacted] 127-1961

STANDARD DRUG COMPANY, INC.,
Appellant,

v.

GENERAL ELECTRIC COMPANY,
Appellee.

JURISDICTIONAL STATEMENT

Appeal from the Supreme Court of Appeals of Virginia

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TABLE OF CONTENTS

	Page
Opinions Below	1
Grounds of Jurisdiction	2
The Questions Presented	3
Statement of the Case	4
The Federal Questions Involved Are Substantial	12
Appendix:	
Opinion of the Trial Court	App. 1
Judgment of the Trial Court	App. 6
Opinion of the Supreme Court of Appeals of Virginia	App. 8
Judgment of the Supreme Court of Appeals of Virginia	App. 26
Order of the Supreme Court of Appeals of Virginia Denying Petition to Rehear	App. 27
Virginia Fair Trade Act	App. 28

TABLE OF CITATIONS

Cases

Benrus Watch Company, Inc. v. Jack Kirsch, Trading as Smith-Williams Jewelers, 198 Va. 94, 92 S. E. 2d 384 (1956) 5

Bulova Watch Company, Inc. v. Robinson Wholesale Co., 108 N. W. 2d 365 (1961) 14

Dr. Miles Medical Co. v. John D. Park & Sons Company, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911) 13

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (1931) 18

Page

Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936) 3, 7, 10, 14, 21

Reconstruction Finance Corp. v. Beaver County, Pa., 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172 (1946) 3

Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951) 15, 18

Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F. 2d 788 (5th Cir. 1953), Cert. Denied, 346 U. S. 856, 98 L. Ed. 369, Rehearing Denied, 346 U. S. 905, 98 L. Ed. 404 (1953) 16

Statutes

Fair Trade Act, Section 1, Chapter 259, Acts of Assembly, 1958, Sections 59-8.1 through 59-8.9, Code of Virginia (1950), as amended 2, 3, 7, 8, 17, 21

Fair Trade Act, Title to 20

Fair Trade Act, Section 2, (7) and (8), Section 59-8.2(7) and (8), Code of Virginia (1950), as amended 3, 4

Fair Trade Act, Section 2(10), Section 59-8.2(10), Code of Virginia (1950), as amended 3, 7, 8, 12

Federal Constitution, Fifth Amendment 4, 7, 9

Federal Constitution, Fourteenth Amendment 4, 7, 9

Former Virginia Fair Trade Act, Sections 58-1 through 58-9, Code of Virginia (1950) 5

Miller-Tydings Amendment, Sherman Anti-Trust Act, 50 Stat. 693, 15 U. S. C. A. § 1, 15 F. C. A. § 1 ..... 13, 15, 18, 19

McGuire Act, 66 Stat. 632, 15 U. S. C. A. § 45(a), 15 F. C. A. § 45(a) 11, 13, 16, 18, 19

Page

Sherman Anti-Trust Act, 15 U. S. C. A. §§ 1-7, 15 F. C. A. §§ 1-7 3, 7, 8, 9, 11, 13, 15, 18, 19, 20

United States Code, Title 28, Section 1257(2) 2

Virginia Constitution, Section 52 21

Article

Washington and Lee Law Review 14

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Appeal from the Supreme Court of Appeals of Virginia

OPINIONS BELOW

The opinion rendered by the trial court in this case, the Law and Equity Court of the City of Richmond, Virginia, is not reported. It is set forth in a letter dated June 19, 1959 addressed to counsel for the litigants by the Honorable Thomas C. Fletcher, Judge. This opinion is printed in the Appendix beginning at page 1. The judgment entered thereon is printed in the Appendix at page 6.

The opinion of the Supreme Court of Appeals of Virginia is reported in Volume 202 of the Official Virginia Reports, beginning at page 367 (202 Va. 367). It is also reported in Volume 117 of the Southeastern Reporter, Second Series, beginning at page 289 (117 S. E. 2d 289). This opinion is printed in the Appendix beginning at page 8. The judgment entered thereon appears in the Appendix at page 26.

GROUNDS OF JURISDICTION

This case originated as a suit by Standard Drug Company, Incorporated, a Virginia corporation, against General Electric Company, a New York corporation, under and pursuant to Section 8-578, Code of Virginia (1950), as amended, seeking a declaratory judgment that the Virginia "Fair Trade Act", Section 1, Chapter 259, Acts of Assembly of 1958 (Sections 59-8.1 through 59-8.9, Code of Virginia (1950), as amended), was unconstitutional, void and without the force of law. The suit was filed in the Law and Equity Court of the City of Richmond, Virginia on June 27, 1958. On June 19, 1959 the Court upheld the validity of the statute, and thereafter Standard Drug Company, Incorporated, perfected an appeal to the Supreme Court of Appeals of Virginia. On November 28, 1960, that Court handed down its opinion affirming the judgment of the trial court. On December 28, 1960 Standard Drug Company, Incorporated filed a timely Petition for Rehearing in the Supreme Court of Appeals of Virginia. By order dated January 16, 1961 (Appendix, page 27) the Court denied said Petition. On April 7, 1961 Standard Drug Company, Incorporated filed in the Law and Equity Court of the City of Richmond, Virginia, to which the record in this case had been returned by the Supreme Court of Appeals of Virginia, its Notice of Appeal to the Supreme Court of the United States.

This appeal involves the validity of a statute of the State of Virginia which the Appellant asserts is repugnant to the Sherman Anti-Trust Act and the Fifth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of Appeals of Virginia has upheld the validity of the statute, and Section 1257(2) of Title 28 of the United States Code confers jurisdiction of this appeal upon the Supreme Court of the United States.

The jurisdiction of the Court in such circumstances was sustained in *Reconstruction Finance Corp.* v. *Beaver County, Pa.*, 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172 (1946) and *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936).

This statute, the so-called "Virginia Fair Trade Act", was enacted by the General Assembly on March 8, 1958. It became effective on June 27, 1958, and it is found at Chapter 259, Section 1, Acts of Assembly, Virginia, 1958, and also Sections 59-8.1 through 59-8.9 inclusive, Code of Virginia (1950), as amended. It is set forth verbatim in the Appendix, beginning at page 27.

THE QUESTIONS PRESENTED

1. Does subsection (10) of Section 2 of the Virginia Fair Trade Act, Section 59-8.2(10), Code of Virginia (1950), as amended, create a conclusive presumption of the existence of a contract in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Does the Virginia Fair Trade Act authorize producers and distributors to fix resale prices in violation of the Sherman Anti-Trust Act, as amended (50 Stat. 693, 15 U.S.C.A. § 1, 15 F. C. A. § 1), since the Sherman Anti-Trust Act permits the fixing of resale prices only by contracts or agreements when valid under state law and the Virginia Fair Trade Act authorizes the fixing of resale prices although no contract or agreement may exist other than under the definitions contained in the Virginia Act?

3. Does the Virginia Fair Trade Act by virtue of the broad definitions of "Trade-mark" and "Trade name" set forth in subsections (7) and (8) respectively of Section 2

of the Act Sections 59-8.2(7) and (8), Code of Virginia (1950), as amended, confer upon the producers and owners of goods identified by a "Trade-mark" or "Trade name" rights and privileges not available to the owners of goods not so identified in violation of the equality and due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

—4. Does the Virginia Fair Trade Act authorize producers and distributors to fix resale prices in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

The facts involved in this case were stipulated, and are summarized in the following paragraphs.

The Appellant, Standard Drug Company, Incorporated (hereinafter for convenience referred to as "Standard Drug"), is a corporation organized and existing under the laws of the State of Virginia, with its principal office at 3301 Rosedale Avenue, Richmond, Virginia, engaged in the sale at retail of prescription drugs and other drug products, sundries and general merchandise at various locations in the City of Richmond and other cities in Virginia.

The Appellee, General Electric Company (hereinafter for convenience referred to as "General Electric"), is a corporation organized and existing under the laws of the State of New York, with its principal office at 1 River Road, Schenectady 5, New York, engaged in the manufacture, distribution and sale at wholesale of, among other things, electric appliances and supplies of various kinds. General Electric has qualified to do business in the State of Virginia. Among the products sold and distributed by General Electric are photo flashbulbs.

For some time prior to June 27, 1958 Standard Drug had been purchasing photo flashbulbs from General Electric for sale at retail. Since April 23, 1956, the date of the decision of the Supreme Court of Appeals of Virginia in the case of *Benrus Watch Company, Inc.* v. *Jack Kirsch, Trading as Smith-Williams Jewelers*, 198 Va. 94, 92 S. E. 2d 384, in which the former Virginia "Fair Trade Act", Sections 59-1 through 59-8, Code of Virginia (1950), as amended, was invalidated, Standard Drug had offered for sale and sold such flashbulbs at retail prices determined solely by it.

On March 8, 1958 the General Assembly of Virginia enacted into law an Act designated as the "Fair Trade Act", Section 1, Chapter 259, Acts of Assembly of 1958, which became effective on June 27, 1958. By letter dated June 9, 1958, General Electric advised Standard Drug that effective June 27, 1958 it was "fair trading" its flashbulbs in the Commonwealth of Virginia. The letter requested Standard Drug to observe General Electric's "retail Fair Trade prices", a list of which was included with the letter.

On August 29, 1958 Standard Drug purchased from General Electric a quantity of flashbulbs manufactured by General Electric. These flashbulbs were received by Standard Drug, and at the time they were received Standard Drug had in its possession a "List of Fair Trade Minimum Retail Prices" for General Electric flashbulbs. This was the list received by Standard Drug with the letter from General Electric dated June 9, 1958.

By advertisement inserted in the Richmond News Leader, a newspaper of general circulation in the City of Richmond, Virginia and vicinity, for October 23, 1958 Standard Drug offered the flashbulbs purchased from General Electric as aforesaid, as well as flashbulbs purchased by it prior to

June 27, 1958, for sale at prices less than those set forth in the list of fair trade minimum retail prices furnished by General Electric. Following this advertisement Standard Drug sold these flashbulbs at prices less than those specified in the list of prices furnished by General Electric.

For the purpose of this case it has been stipulated that unless receipt by Standard Drug of the letter from General Electric dated June 9, 1958, with the "List of Fair Trade Minimum Retail Prices" attached thereto, together with the purchase by Standard Drug since that date of photo flashbulbs from General Electric for resale, constitutes a contract by virtue of the operation of the Fair Trade Act, Standard Drug has not entered into any contract or agreement and knows of no contract or agreement to maintain General Electric's resale prices. It is further stipulated for the purpose of this case that in connection with the aforesaid sale to Standard Drug of flashbulbs General Electric had taken all action necessary to comply with the requirements of the Fair Trade Act in order to entitle it to enforce the "contract" if the Fair Trade Act and such "contracts" as are therein defined are valid and enforceable.

On June 27, 1958 Standard Drug filed in the Law and Equity Court of the City of Richmond, Virginia its motion for a declaratory judgment that the Virginia Fair Trade Act was unconstitutional, void and without the force of law. General Electric filed its grounds of defense thereto on August 8, 1958. By leave of court Standard Drug on December 17, 1958 filed an amended motion for a declaratory judgment, and on the same date General Electric filed its grounds of defense to the amended motion.

The case was argued orally in the trial court on December 17, 1958 and written briefs were filed. In oral argument, and in its written memorandum of argument filed in the trial court, Standard Drug argued, among other things, that

(i) subsection (10) of Section 2 of the Fair Trade Act, Section 59-8.2(10), Code of Virginia (1950), as amended, creates a conclusive presumption of the existence of a contract and therefore violates the due process provisions of the Fourteenth Amendment to the Constitution of the United States;

(ii) the Fair Trade Act authorizes price fixing without contracts or agreements of any kind and is therefore in conflict with the Sherman Anti-Trust Act and void;

(iii) in view of the broad definitions of trade-mark and trade name contained in the Fair Trade Act the holding in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936), upholding the Illinois Fair Trade Act on the ground that it was protective of good will, does not apply, and the Virginia Fair Trade Act therefore violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and

(iv) the Fair Trade Act delegates to producers and distributors the authority to fix prices in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The trial court, in an opinion by the Honorable Thomas C. Fletcher, Judge, held that the Fair Trade Act was as much a part of the contract of purchase between Standard Drug and General Electric as if set forth expressly therein, and with respect to the constitutional questions stated as follows (Appendix, page 4):

> In the view above expressed that the minimum resale price results from a contract of the parties, and that is the basis of this decision, then the liberty and due

> process provisions of the State and Federal Constitutions have no application. That public policy which once regarded the fixing of resale prices as repugnant to ownership and in restraint of trade has been altered by the Fair Trade Act. It is a proper function of the General Assembly, within constitutional limitations, to determine such questions of public policy.

With respect to the contention that the statute is in conflict with the Sherman Anti-Trust Act Judge Fletcher held that (Appendix, page 5):

> . . . the amendments of that Act except fair trade agreements and non-signer clauses, if valid under State law.

On October 13, 1959 Standard Drug filed its Notice of Appeal to the Supreme Court of Appeals of Virginia and Assignments of Error. Included among the assignments of error were the following (Record 5136, Supreme Court of Appeals of Virginia, page 21):

> 8. The Court erred in failing to hold that subsection (10) of § 2 of the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, is an attempt by the General Assembly to create a conclusive presumption of the existence of a contract, contrary to the provisions of the Constitution of the State of Virginia and the Constitution of the United States.
>
> 9. The Court erred in holding that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the Acts of Assembly of Virginia of 1958, is not in conflict with the Sherman Anti-Trust Act, as amended.
>
> 10. The Court erred in failing to hold that the Fair Trade Act of Virginia, Section 1, Chapter 259 of the

> Acts of Assembly of Virginia of 1958 violates the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution.

On December 21, 1959 Standard Drug filed in the Supreme Court of Appeals of Virginia at Richmond its Petition for Appeal. In this petition Standard Drug argued, among other things, that

> (i) the Virginia Fair Trade Act creates a conclusive presumption of the existence of a contract in violation of the equality and due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States;
>
> (ii) it is a law authorizing price fixing without agreements of any kind and is therefore in conflict with the Sherman Anti-Trust Act and void;
>
> (iii) in view of the broad definitions of "Trademark" and "Trade name" contained in the Virginia Fair Trade Act the case of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp., supra,* upholding a similar statute on the ground that it was protective of good will, does not apply, and the statute violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and
>
> (iv) the statute delegates price fixing authority to private individuals in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The appeal was granted and on May 18, 1960 Standard Drug filed its opening brief in the Supreme Court of Appeals of Virginia in which it fully argued the aforesaid contentions that the Virginia Fair Trade Act is invalid because it is in conflict with the Constitution of the United States and the Sherman Anti-Trust Act.

The Supreme Court of Appeals of Virginia, in its opinion written by Justice Willis D. Miller handed down November 28, 1960, stated as follows concerning the federal questions involved in the case (202 Va. at 370, 117 S. E. 2d at 292 (Appendix, page 11)):

> . . . during the trial in the lower court and by its assignments of error, it appears that Standard asserted and litigated the question of whether or not the Act violates the Fifth and Fourteenth Amendments of the Constitution of the United States.

The Court held that the facts involved in this case established that Standard Drug had contracted directly with General Electric when the purchase of flashbulbs involved was made, by the terms of which contract Standard Drug agreed not to resell at less than specified minimum prices, and (Appendix, page 17):

> It cannot now justly complain because it is not free to use and impair the goodwill of General Electric by selling the bulbs at a price less than it agreed to maintain.

Citing the case of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp., supra,* the Court further held that the Virginia Fair Trade Act merely permits the fixing of prices of "identified" goods under legislative leave by contract between the parties. The Court upheld the statute in the following language (Appendix, page 17):

> No provision of the Act infringes upon §§ 1 and 11, Constitution of Virginia, or upon the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.
>
> It was also held in *Old Dearborn* that the non-signer provision did not constitute arbitrary or special legis-

lation infringing upon the equal protection clause of the Fourteenth Amendment because it represented a reasonable classification as between trade-marked and unmarked goods.

It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the "non-signer" provision and substitution of the provision that permits the voluntary contractural restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional.

With the "non-signer" provision eliminated, and upon the authority of *Old Dearborn*, we have no difficulty in holding that the act is not in violation of the Constitution of the United States.

The Supreme Court of Appeals of Virginia also held that the Virginia Fair Trade Act is not in conflict with the Sherman Anti-Trust Act in the following language (Appendix, page 25):

Standard argues that the McGuire Act exempts from the Sherman Act only statutes binding non-signers to observe minimum resale prices specified in contracts or agreements of which they have knowledge. It maintains that the Virginia Act does not fall within the terms of the exemption because the term contract as defined by the Act is no contract, but merely a stipulation by the seller made a "contract" by legislative fiat regardless of assent by the buyer. In short, Standard asserts and argues that the law authorizes price fixing without contractural agreement of any kind, and thus it is in conflict with the Sherman Anti-Trust Act and void.

We cannot agree with this contention and analysis of the pertinent acts. Here there is no legislative price

fixing; the restriction against selling the trade-marked goods at less than a specified minimum price is limited to voluntary agreements. The challenged provisions of § 59-8.2(10) are not compulsory, but merely permissive and evidential. The entire agreement made between the manufacturer of the trade-marked commodity and the retailer, embodying the restriction as to its minimum retail price, is not imposed by law; it is voluntary, and the agreement constitutes a contract within the meaning of the pertinent federal and state legislation.

Appellant seeks review of the judgment of the Supreme Court of Appeals of Virginia and contends that the Virginia Fair Trade Act is in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States and the Sherman Anti-Trust Act.

THE FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL

This case presents a question of freedom to contract or, more aptly, freedom not to contract, against the background of twentieth century economics. Today scarcely an article of commerce is without a trade mark or trade name within the sweeping definitions of the Virginia statute. By like statutory definition any purchaser of such an article with notice of resale prices imparted by mail or attached to the article or its container is deemed conclusively to have entered into a "contract" to observe them.

The answer to the purchaser's protest that he made no such contract in fact is a legalistic *quod es demonstrandum* —he had freedom of choice to buy or not to buy: having bought he accepted all conditions imposed by seller and statute.

Of course, a retail merchant has no such freedom. Were

all articles falling within the definitions of trade-marked and trade named commodities absent from his shelves none would be left. To stay in business he is compelled to buy, just as the seller is compelled to sell; there is no genuine freedom on the part of either. The statute, however, confers upon the seller an election to impose upon this buyer a price maintenance obligation, hallows this with the name of "contract", and takes away the buyer's right to show that it was otherwise. This is not consent; this is compulsion. This is not, it is submitted, the type of contract or agreement excepted from the operation of the anti-trust statutes by the Miller-Tydings (50 Stat. 693, 15 U. S. C. A. §1, 15 F. C. A. §1) and McGuire (66 Stat. 632, 15 U. S. C. A. §45(a), 15 F. C. A. §45(a)) amendments to the Sherman Act.

Manufacturers and distributors of articles of commerce have for decades employed various devices designed to control the retail prices charged for their products, and litigation with respect thereto has been voluminous in both state and federal courts.

One of the earliest full scale efforts by a business selling its products throughout the country to completely control retail prices of its products was made by Dr. Miles Medical Company. In order to carry out its purpose this company required each wholesale distributor and each retailer handling its products to enter into a written agreement not to sell its products for less than the prices printed on the packages by the manufacturer. In 1911 this Court, in *Dr. Miles Medical Co. v. John D. Park & Sons Company*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, held that such contracts were unlawful restraints of trade at common law and in violation of the Sherman Anti-Trust Act (15 U. S. C. A. §§1-7, 15 F. C. A. §§1-7).

There followed a number of unsuccessful efforts by pro-

ponents of this practice to secure the enactment of federal fair trade legislation. See *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 190, 57 S. Ct. 139, 143, 81 L. Ed. 109, 117 (1936). Finally these efforts were directed to state legislatures, and in 1931 California became the first state to enact a so-called "fair trade" law. By 1939 forty-five states, including Virginia, had enacted similar statutes. The general scheme of these statutes was the same: contracts between manufacturers and retailers by which the latter agreed not to resell the manufacturer's products for prices less than those prescribed by the manufacturer were made valid, and it was further provided that a retailer with knowledge of the existence of such a contract, although he was not a party thereto, was also bound thereby. The latter provision is commonly known as the "non-signer" clause.

The validity of these statutes has been litigated in almost every state in which they have been enacted and it is impossible to reconcile the decisions. Since 1949, when the Florida Supreme Court became the first state court of last resort to invalidate a fair trade act on constitutional grounds, the courts of eighteen other states have reached the same conclusion, although not always for the same reasons. During the same period nine such statutes were upheld. See 18 Washington and Lee Law Review 176. Since the date of that article the Supreme Court of Iowa has become the nineteenth state court of last resort to hold such a statute unconstitutional. *Bulova Watch Company, Inc.* v. *Robinson Wholesale Co.*, 108 N. W. 2d 365 (1961).

This Court first considered such a statute in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, *supra*, in which it held valid the non-signer provision of the Illinois fair trade law. Interstate commerce was not involved, and

hence the validity of such legislation as affected by the Sherman Anti-Trust Act was not an issue. In that case the Court held that the statute did not deny due process of law on the principal ground that upon purchase of a commodity bearing a trade-mark or trade name the buyer acquires the commodity only and not the goodwill of the seller, the latter being represented by the trade-mark or trade name attached to the commodity; that enforcement of resale price restrictions through the non-signer provision merely prevented the buyer from making use of the seller's goodwill (trade-mark or trade name) in marketing the commodity unless the stipulated prices were maintained; and that the primary purpose of the fair trade law was therefore to protect goodwill, and the price-fixing feature of the law was only incidental thereto. It was further held that the non-signer provision did not deny equal protection of the laws for the reason that it was applicable only to commodities bearing a trade-mark or trade name.

Section 1 of the Sherman Anti-Trust Act (50 Stat. 693, 15 U. S. C. A. §1, 15 F. C. A. §1) was amended in 1937 by the Miller-Tydings Act. This amendment exempted from the prohibitions of the Sherman Act

> contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity . . . when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any state.

In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951), it was held

that this amendment exempted only contracts or agreements providing for resale price maintenance, did not exempt the non-signer provision of state fair trade laws, and that such provisions therefore violated the Sherman Act. Of the non-signer provision the Court said:

> That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.

In 1952 Congress enacted the McGuire Act, 15 U. S. C. A. §45(a), 15 F. C. A. §45(a), enlarging the exemption from the prohibitions of the Sherman Act created by the Miller-Tydings Act to include any state law

> which in substance provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising for sale, or selling is or is not a party to such contract or agreement is actionable at the suit of any person damaged thereby.

This Court has not decided the constitutionality of the McGuire Act, but it denied certiorari in a case in which that Act was held constitutional. *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir. 1953), *Cert. Denied*, 346 U. S. 856, 98 L. Ed. 369, *Rehearing Denied*, 346 U. S. 905, 98 L. Ed. 404 (1953). Aside from the question of constitutionality the Circuit Court made the following observation with respect to the McGuire Act:

> The McGuire Act did not delegate the power of Congress to say what fair trade legislation should be permitted in interstate commerce, but spelled out in detail

the type of fair trade statute to which the Congressional consent was to apply by specifying the standards and safeguards which a state act must embody in order to qualify for interstate effectiveness.

The present Virginia Fair Trade Act the validity of which is at issue in this case is a new concept in fair trade legislation designed to avoid the legal pitfalls which the non-signer provision has frequently encountered, but to accomplish the same result by creating a conclusive presumption of the existence of a contract. This statute undertakes to bind retailers not by virtue of their being on notice of the existence of a contract between the manufacturer and another retailer, but by virtue of simple notice from the manufacturer to the retailer himself that the manufacturer requires resale price maintenance. The mere attachment by the manufacturer of a fair trade price to his commodity is all that is required by this statute to bind a purchaser to maintain that price. Apart from this statutory presumption not even a single contract between a manufacturer and a retailer is required.

In obvious deference to federal legislation which clearly contemplates the existence of one or more contracts or agreements, the statute provides that actual notice shall be "deemed" to be a "contract." The statute therefore literally creates a "contract" even though the seller knows at the time of sale that the purchaser not only has not agreed to maintain prices but in fact intends to disregard them. In short, the statute creates a conclusive presumption that a contract comes into existence upon purchase by a retailer with actual notice of minimum resale prices. Where such facts exist the retailer is effectively precluded from introducing evidence to the contrary, even though both in fact and in legal contemplation a sale by a manufacturer to a retailer whom the

manufacturer knows has no intention of abiding by price restrictions would amount to a waiver of those restrictions. Such a statute is clearly violative of due process. In the language of this Court, *Heiner* v. *Donnan*, 285 U. S. 312, 329, 52 S. Ct. 358, 362 (1931):

> . . . it constitutes an attempt, by legislative fiat, to enact into existence a fact which does not, and cannot be made to exist in actuality. . . . This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th amendment.

If, as this statute now provides, notice is a contract, then the non-signer under the typical fair trade statute is also a party to a contract. In both types of statute notice is the element necessary to bind the party. But the McGuire Act does not exempt statutes which make persons having simple notice parties to a contract by legislative fiat. It merely enlarged the exemption originally created by the Miller-Tydings amendment to include the non-signer feature of statutes mentioned in the Miller-Tydings amendment, and that amendment contemplates a statute providing for the existence of at least one contract or agreement. This Court so held in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, *supra*, in the following language:

> . . . when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. . . . Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual "vertical" agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. A real sanc-

> tion can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness.
>
> The contrary conclusion would have a vast and devastating effect on Sherman Act policies. If it were adopted, once a distributor executed a contract with a single retailer setting the minimum resale price for a commodity in the state, all other retailers could be forced into line. Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted, either a non-signer provision would have been included or resale price fixing would have been authorized without more. Certainly the words used connote a voluntary scheme. Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing. (341 U. S. at 389, 71 S. Ct. at 748, 95 L. Ed. at 1045.)

As already observed, the Sherman Act has been further amended to exempt the non-signer provision of fair trade statutes authorizing fair trade contracts. But this exemption extends only to statutory provisions binding non-signers having notice of the existence of a ***contract or agreement*** providing for resale price maintenance. It does not authorize "resale price fixing".

It is the contention of Appellant that the Virginia Fair Trade Act is materially different from the type of statute contemplated by the Miller-Tydings and McGuire amendments to the Sherman Act. It does not contain the "standards and safeguards", *supra*, page 19, required to bring it within these exemptions from the Sherman Act, because it

does not contemplate or require the existence of a contract or agreement of any kind. Its provision that notice is a contract does not require the existence of a "voluntary engagement" but is the equivalent of the non-signer provision alone. A fair trade statute making no provision for a contract or agreement of any kind, and containing nothing more than a provision for the equivalent of a non-signer clause, cannot meet the requirements for exemption from the prohibitions of the Sherman Act, and is in conflict therewith.

Proponents of this legislation assert that the retailer has no cause to complain if he purchases with notice and thereby becomes bound, because he is free to buy or not to buy the product. *This of course is nothing more than lip service to freedom. A retailer also has the choice of either operating or liquidating his business. He may as well elect to liquidate as to decline to buy merchandise his customers demand.*

With equal force it may be said that the seller may enforce such restrictions effectively by refusing to sell to those who decline to abide by such restrictions as he elects to impose. Absent such legislation as the Fair Trade Act seller and buyer each have this "right" in dealing with each other. But the statute destroys this equality by making it unnecessary for the seller to exercise his right. The balance of the market place is thus destroyed, and the result is that the seller is given the power to fix prices in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The title of the Virginia act is most revealing. It defines the act in part as "An Act to permit any producer or distributor to prescribe minimum resale prices of a commodity. . . ." Not only is this an accurate description of the statute, but in view of its substantive provisions it likewise

reflects the intent of the General Assembly of Virginia. The term "contract" is not mentioned in the title, notwithstanding that Section 52 of the Constitution of Virginia requires that the title express the object of the statute. This is convincing evidence that it was not the intention of the General Assembly of Virginia in enacting this statute to authorize contracts in the usual sense.

Instead producers and distributors are authorized to prescribe the retail prices of their products without adhering to guides or standards of any kind, without review by any authority to determine if the public interest is in fact being served by such prices, and without concerning themselves with whether the vendee in fact agrees to maintain those prices or not. It is thus clearly a statute authorizing price fixing in violation of due process of law and the Sherman Anti-Trust Act.

In the *Old Dearborn* case this Court upheld a fair trade act containing a non-signer clause on the ground of the distinction made by it between goods bearing a trade-mark or trade name and goods not so identified. But the Court was not concerned so much with the mark or name itself as the goodwill which they were found to symbolize. The present Virginia Fair Trade Act contains definitions of trade-mark and trade name which are so broad that for practical purposes all commodities bearing a name or mark of any kind are included. It is clear from the use of such broad definitions of these terms in the subject legislation that the existence of goodwill is irrelevant. It does not follow from the mere existence and use of a trade-mark or trade name that the owner is possessed of goodwill having a value justifying such protective legislation as fair trade laws. The statute therefore discriminates between goods bearing a

trade-mark or trade name as defined therein and those not so identified and thus violates due process of law and denies equal protection of the laws.

As of this writing a similar statute has been enacted by the legislature of Ohio and is now being tested in the courts of that state. The courts of last resort of some nineteen states have held fair trade laws unconstitutional. The decision of the Supreme Court of Appeals of Virginia upholding this statute has created grave concern in broad areas of American business, and jubilation among the proponents of fair trade. It is safe to predict that the latter will push rapidly for new legislation of this nature in those states which have invalidated previously existing fair trade laws, and perhaps even in those states which have upheld them since this new type of statute requires no contract at all and prices can be fixed by the unilateral act of the manufacturer. In view of the all inclusive definitions of trade-mark and trade name which are a part of the statute, the widespread passage of similar legislation will place the determination of retail prices of practically every article of commerce under the effective control of manufacturers and distributors, who are subject to economic pressures from retailers who desire high prices, and free and open competition at the retail level, the traditional safeguard of fair prices, may be seriously curtailed if not destroyed. No result could be more contrary to the public interest and violative of due process of law.

This is a new type of legislation. It is much more extreme than fair trade laws which have existed heretofore. The possible extension of price fixing under the authority of such statutes into every area of American business makes it important that the status of this legislation under the

Sherman Anti-Trust Act and the Constitution of the United States be determined.

Respectfully submitted,

STANDARD DRUG COMPANY, INCORPORATED,
By LEROY R. COHEN, JR.
Of Counsel

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APPENDIX

LAW AND EQUITY COURT
OF THE
CITY OF RICHMOND
RICHMOND, VIRGINIA

June 19, 1959

Messrs. Haw and Haw,
Witt & Cohen,
Williams, Mullen, Pollard & Rogers,
Morton L. Wallerstein,
Henry T. Wickham,
Attorneys at Law,
Richmond, Virginia.

Re: Standard Drug Company, Incorporated,
v. General Electric Company;

Gentlemen:

The plaintiff filed its motion for a declaratory judgment that the "Fair Trade Act," Section 1, Chap. 259, Acts of 1958, is unconstitutional and void and that the defendant "may not fix the retail prices to be charged for flashbulbs purchased from it by the defendant." The case has been submitted upon a written stipulation of fact, from which it appears that the defendant is a manufacturer of flashbulbs, and the plaintiff a retailer and regular customer. The issues of the case have been so ably presented and argued that I feel no useful purpose would be served by a detailed discussion here of the precedents cited.

The Act in question became effective on June 27, 1958. It provides that "'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof. It provides that:

"The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be prima facie evidence of actual notice of the terms of the 'contract'. Acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract' ..... No contract . . . . shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller . . ."

By letter of June 9, 1958, receipt of which is conceded, the defendant notified the plaintiff that, effective June 27, 1958, it was "Fair trading its flashbulbs in Virginia," and enclosed a list of minimum retail prices. In August, 1958, the defendant shipped to the plaintiff, on its order, the flashbulbs here involved. No suggestion was offered by the latter that the contract of sale expressly free it from restriction as to resale.

A former "Fair Trade" act was before this court in the case of *Benrus Watch Co.* v. *Kirsch.* Judge Young was of opinion that it was in conflict with the Virginia anti-monopoly statute passed at the same session (1950) and that the latter must prevail under the rule that the earlier must yield to the later expression of the legislative will where there is a repugnancy between two acts," but that in the event this was a misinterpretation of the statutes the non-signer provisions of the "Fair Trade" act were in conflict with sections 40 and 52 and also the liberty and due process clauses of the constitution of Virginia. This decision was affirmed by our Supreme Court of Appeals, (198 Va. 94) for the reason that the statutes conflicted. That case involved a non-signer provision. It throws little light on the present

case which has to do with a "vertical" rather than a "horizontal" agreement, another "Fair Trade" statute having been since enacted with a more comprehensive title. (Acts 1958, Chap. 259, p. 311). Judge Young said in his opinion: "The validity of voluntary price maintenance contracts, as between the parties thereto, is not before me and I express no opinion with reference thereto." Our Court of Appeals, in affirming his decree, said at p. 99, ". . . we do not reach the very serious questions raised as to the constitutionality of the Fair Trade Act. . ."

The question presented by the case, therefore, is whether there was an agreement between the parties as to the minimum resale price of the flashbulbs and, if so, did it contravene the laws or public policy of the Commonwealth.

According to 12 Am. Jur. 769, (Contracts, section 240), "It is commonly said that the existing statutes and the settled law of the land at the time a contract is made became a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention."

The language of the statute is clear and when the plaintiff bought the flashbulbs it did so with notice and knowledge that the minimum resale price provision would become a part of contract of purchase. It is in the same position as if this condition had been expressly contained in the offer to sell and accepted. It had its freedom of choice to buy or not to buy.

There is nothing novel or new about statutes which provide that the doing of certain things shall raise certain presumptions as to the intentions, rights and liabilities of the parties. To cite a few instances:

Abbreviated forms of covenants of warranty are almost universally used in deeds and the statutes fix their exact meaning:

One who conveys land to secure a debt by deed of trust which is silent as to methods of enforcement finds that by virtue of the statute he has made numerous covenants as to payment of taxes, maintenance, waste, etc., and provided in considerable detail for sale by the trustee in the event of default;

Insurance policies are required by statute to contain certain provisions favorable to policy holders, and are construed as if such provisions were expressly contained, notwithstanding they may have been omitted.

There are many others. I think we may take it that the parties hereto, by virtue of the statute, mutually agreed upon a minimum resale price of the flashbulbs.

I am further of opinion that the question whether this agreement violates our laws or public policy must be answered in the negative.

In the view above expressed that the minimum resale price results from a contract of the parties, and that is the basis of this decision, then the liberty and due process provisions of the State and Federal Constitutions have no application. That public policy which once regarded the fixing of resale prices as repugnant to ownership and in restraint of trade has been altered by the Fair Trade Act. It is a proper function of the General Assembly, within constitutional limitations, to determine such questions of public policy.

It is argued that the Fair Trade Act is in conflict with our Anti Monopoly statute. It is, but the Fair Trade Act must prevail under the rule mentioned by Judge Young that the earlier must yield to the later expression of the legislative will where there is a repugnancy between two acts. The requirement of section 165 of the Virginia Constitution that "The General Assembly shall enact laws preventing all

trusts, combinations and monopolies, inimical to the public welfare," is not self executing. The General Assembly has broad discretion in determining what is "inimical to the public welfare." What we have here is merely another exception to the Anti Monopoly statute. I do not feel that it goes beyond a legitimate exercise of this discretion.

It is also urged that the Fair Trade Act is in conflict with the Sherman Anti-Trust Act, as amended. As pointed out by Judge Young, "Section 1 of the Sherman Anti-Trust Act merely makes those practices which were illegal at common law illegal under that Act if they affect interstate commerce." There is nothing in the pleadings or stipulation of fact to suggest, except perhaps by implication that the sale here under consideration was an interstate transaction. If it were, the amendments of that Act except fair trade agreement and non-signer clauses, if valid under state law.

I am of opinion that no constitutional right of the petitioner has been violated.

A draft of order may be presented dismissing the petition.

Very sincerely yours,

(s) Thomas C. Fletcher

VIRGINIA:

IN THE LAW AND EQUITY COURT
OF THE CITY OF RICHMOND

STANDARD DRUG COMPANY, INCORPORATED,
Plaintiff

v.

GENERAL ELECTRIC COMPANY,
Defendant

Order

Upon consideration of the Plaintiff's amended motion for a declaratory judgment; the Defendant's grounds of defense to the amended motion; the stipulation of facts filed herein and the oral arguments and briefs of Counsel, the Court is of the opinion that the "Fair Trade Act" Chapter 259, Acts of Assembly of Virginia, 1958, is valid and constitutional for the reasons set forth in its written opinion in letter form, dated June 19, 1959, to be read and considered as a part hereof, it is

ADJUDGED, ORDERED and DECREED that the "Fair Trade Act" of Virginia, Chapter 259 of the Acts of Assembly of Virginia of 1958, is valid and constitutional, and the Court does so declare, and it is

Further ADJUDGED, ORDERED and DECREED that the Defendant may in the manner provided by the Virginia Fair Trade Act fix the minimum retail prices to be charged for flashbulbs sold by it.

It is further ADJUDGED, ORDERED and DECREED that the

Defendant do recover its costs of the Plaintiff.
To all of which the Plaintiff by Counsel excepts:

We ask this:

(s) Walter E. Rogers
Counsel for General Electric Company

We have seen and object to the entry of
the foregoing order:

(s) Robert A. Cox, Jr.
(s) Geo. E. Haw of Haw & Haw
Counsel for Standard Drug Company, Incorporated

SUPREME COURT OF VIRGINIA

Record No. 5136

STANDARD DRUG COMPANY, INCORPORATED

v.

GENERAL ELECTRIC COMPANY

From the Law and Equity Court of the City of Richmond
Thomas C. Fletcher, Judge

OPINION BY JUSTICE WILLIS D. MILLER
Richmond, Virginia, November 28, 1960

Present: All the Justices

A motion for a declaratory judgment under §8-578, *et seq.*, Code 1950, was filed by Standard Drug Company, Incorporated, a Virginia corporation, against the General Electric Company, a New York corporation authorized to do business in Virginia. The object of the proceeding was to have the court declare the Fair Trade Act unconstitutional and invalid, and adjudicate that General Electric may not fix the retail prices to be charged by Standard for flashbulbs purchased by it from General Electric.

In paragraphs one to six, inclusive, of Standard's motion it is alleged that General Electric is engaged in the manufacture, distribution and sale at wholesale of flashbulbs and other commodities; that Standard is engaged in sale at retail of flashbulbs and other commodities; that by letter of June 9, 1958, from General Electric, which included a

schedule of prices, Standard was advised that effective June 27, 1958 (the day the "Fair Trade Act" became effective), General Electric was fair trading its flashbulbs in Virginia, and Standard was requested to observe the retail fair trade prices and referred to the list of fair trade prices on flashbulbs; that Standard's receipt of the letter with the list of fair trade minimum retail prices attached, together with the purchase by Standard, since receipt of the letter, of flashbulbs from General Electric for resale is within the statutory definition of a contract set forth in the act purporting to require resale at prices not less than those specified by General Electric. It is then alleged that subsequent to June 27, 1958, Standard sold flashbulbs purchased from General Electric both before and subsequent to that date at retail prices determined solely by Standard "and for less than the retail prices prescribed by" General Electric.

In paragraphs 7 and 8 of the motion it is charged that the Fair Trade Act is in restraint of Standard's right to conduct its lawful business and violative of §§ 1 and 11, Constitution of Virginia; constitutes unconstitutional delegation of legislative power to private individuals and corporations in violation of § 40; creates arbitrary and unreasonable classifications and grants special rights and privileges to General Electric and others similarly situated in violation of § 63(18); violates § 52 by failing to express the object of the act in the title; authorizes monopolies inimical to the public welfare in violation of § 164, as implemented by the Virginia Anti-monopoly Act, §§ 59-20 to 59-40, Code 1950, as amended, and is therefore illegal and void. It is prayed that the Fair Trade Act be declared unconstitutional and of no effect.

In its grounds of defense General Electric admitted the allegations of paragraphs one to six, inclusive, but denied

that the Fair Trade Act violated the Constitution of Virginia or the Virginia Anti-monopoly Act. It specifically asserted that when Standard received the notice of June 9, 1958, with schedule of flashbulb prices attached, advising it that as of June 27, 1958, General Electric was fair trading its flashbulbs, and with such notice, accepted the bulbs, then by acceptance it agreed to sell the goods at the specified minimum retail sales price.

In a stipulation the litigants agreed that the factual allegations in paragraphs one to six of Standard's motion, which are summarized above, are true. It was also agreed:

I. That pursuant to invoice No. 81888, dated August 29, 1958, General Electric shipped and charged to Standard a quantity of flashbulbs manufactured by it, including 600 standard packages bearing the General Electric trademark of PH 5 flashbulbs which were duly delivered to Standard.

II. That at the time of the purchase and delivery of these flashbulbs Standard had in its possession "a list of fair trade minimum retail prices" for General Electric flashbulbs specifying that General Electric PH 5 flashbulbs should be sold for $0.14 each, or $1.59 "per pack of 12."

III. That by advertisement of October 23, 1958, in the Richmond News Leader, a newspaper of general circulation, Standard offered said PH 5 flashbulbs for sale at $0.12 each, or $1.39 per pack of 12, and pursuant to the advertisement, sold the flashbulbs for $0.12 each and at $1.39 per pack of 12 to various customers on that and subsequent days.

The case was submitted upon the pleadings and stipulation of fact. After oral argument, the trial court entered an order holding the Fair Trade Act constitutional and valid, and declared that General Electric might, in the manner provided

by the act, fix the minimum retail prices to be charged for flashbulbs sold by it. We granted Standard an appeal.

In argument at bar it was stated by counsel for the litigants that the flashbulbs shipped by General Electric and received by Standard are "in free and open competition with commodities of the same general class produced or distributed by others."

Though the motion for judgment contains no specific allegation that the legislation violates the Constitution of the United States, yet during the trial in the lower court and by its assignments of error, it appears that Standard asserted and litigated the question of whether or not the act violates the Fifth and Fourteenth Amendments of the Constitution of the United States.

The pertinent parts of the Fair Trade Act follow:

"59-8.2. The following terms, as used in this chapter, are hereby defined as follows:

"(1) 'Commodity' means any subject of commerce, except [certain enumerated foods and wearing apparel].

* * *

"(3) 'Producer' means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.

"(4) 'Distributor' means any person who identifies a commodity distributed by him by the use of his trade-mark or trade name.

"(5) 'Wholesaler' means any person who buys a commodity for the purpose of resale.

"(6) 'Retailer' means any person selling a commodity to a consumer for use.

"(7) 'Trade-mark' means any word, name, symbol or device, or any combination thereof used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

* * *

"(10) 'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof.

"The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be prima facie evidence of actual notice of the terms of the 'contract'. Acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract.'

"§ 59-8.3. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark or trade name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;

* * *

"59-8.5. No minimum resale price shall be established for any commodity by any person other than the owner of the trade-mark or trade name used in connection with such commodity or a wholesaler specifically authorized to estab-

lish such price by the owner of such trade-mark or trade name.

* * *

"59-8.7. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract is unfair competition and is actionable at the suit of any person damaged thereby."

Section 9 of the act declares that its purposes are, among others enumerated, to protect small business, to safeguard the goodwill of trade-marks and trade names, and further wholesome competition, to prevent monopoly, and to promote the public welfare.

It is enlightening to observe that in the case of *Bourus Watch Co., Inc.* v. *Kirsch*, 198 Va. 94, 92 S. E. 2d 384, decided in the Law and Equity Court of the City of Richmond in 1955, Judge Young of that court held that the "non-signer" provision, *i.e.*, § 59-7, Code 1950,[1] of the then Fair Trade Act (ch. 1, title 59, Code 1950) was in conflict with and repealed by §§ 59-20 and 59-40, Code 1950, of the Anti-monopoly Act, which sections had been amended and re-enacted subsequent to enactment of the Fair Trade Act. He also decided that § 59-7 violated the liberty and due process clauses, *i.e.*, §§ 1 and 11, of the Virginia Constitution and violated §§ 40 and 52 of our Constitution. Upon appeal we sustained the trial court's invalidation of § 59-7 by holding that the Fair Trade Act was in conflict with the subsequently amended sections of the Anti-monopoly Act and had

[1] § 59-7. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

been repealed by implication. We found it unnecessary to determine whether or not the "non-signer" provision then embodied in § 59-7 was unconstitutional as had been determined by the trial court.

In his opinion holding § 59-7 of the former act unconstitutional, Judge Young stated that "the validity of voluntary price maintenance contracts, as between the parties thereto, is not before me and I express no opinion with reference thereto." His views on the constitutional questions were limited to the "non-signer" provisions of § 59-7. Similar provisions have been held invalid in a number of states while being upheld in a number of others. See CCH Trade Regulation Reports, Paragraph 3003.

When the General Assembly re-enacted the Fair Trade Act in 1958, it is clear that in doing so it had in mind the litigation in the *Benrus* case. By § 59-8.9 it reaffirmed the declaration of legislative policy that Fair Trade agreements should not be considered illegal, which was the result brought about by the 1950 amendment to the Anti-monopoly Act. It is also obvious that the legislature desired and undertook to eliminate unconstitutional infirmities, if any, that may have existed in the former act. This is made evident by the elimination of the coercive "non-signer" provision of § 59-7 of the former act and inclusion of the permissively contractual provision of § 2(10) of the 1958 Act (§ 59-8.2, 1960 Cum. Supp., Code 1950).

A majority of the courts that have upheld the Fair Trade Acts from attacks on constitutional grounds have, we think, been led to that conclusion by the decision of the Supreme Court in the case of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109, 106 A. L. R. 1476 (1936).

The *Old Dearborn* case dealt with the validity of § 1 of

the Illinois Fair Trade Act (comparable to the pertinent part of §59-8.3 of the present Virginia act) and §2, the non-signer section of the Illinois act (comparable to §59-7, the non-signer provision of the former Virginia act) under the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution. It was held that while the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, protected by the Fifth and Fourteenth Amendments and generally not to be denied by legislative enactment, yet that principle related only to legislative price fixing and not to fixing prices of "identified" goods under legislative leave by contract between the parties; that the Illinois act did not attempt to fix prices nor delegate such power to private persons, but permitted the designated private persons to contract with respect thereto. The court said that the primary aim of the non-signer provision was to protect the property, namely, the goodwill, of the producer, which he still owned, and the price restriction was adopted as an appropriate means to that legitimate end, not as an end in itself.

It was held that the non-signer section was not so arbitrary, unfair or unreasonable as to constitute a denial of due process, because it dealt not with a commodity alone, but with a commodity plus its brand or trade-mark; that the vendee owns the commodity but not the goodwill that the trade-mark symbolizes; that the non-signer clause "does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it intereferes then only to protect that good will against injury. * * * There is nothing in the act to preclude the purchaser from removing the mark or brand from

the commodity — thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." 299 U. S. at 195, 57 S. Ct. at 145.

The challenged legislation is not fairly comparable to that involved in *Young* v. *Commonwealth*, 101 Va. 853, 45 S. E. 327, where the State, by force of the legislation alone, attempted to prohibit or regulate a lawful business not affected with a public interest or prescribe the manner in which it should be conducted. In the *Young* case a statute by which the legislature sought to prohibit the use of trading stamps in connection with the sale of goods was attacked, and the court held that use of trading stamps was a legitimate activity and could not be prohibited by the State. For the State to prohibit their use by legislation was declared to be violative of § 1, Constitution of Virginia, and the Fourteenth Amendment to the Constitution of the United States. The court said:

"The word 'liberty', as used in the Constitution of the United States and the several States, has frequently been construed, and means more than mere freedom from restraint. * * * The liberty mentioned is deemed to embrace the right of the citizen * * * to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. * * *" (At pages 862, 863.)

The admitted facts establish that Standard, the retailer, contracted directly with General Electric, the manufacturer of the trade-marked flashbulbs, and when the purchase was made, Standard, by the expressed terms of the contract,

agreed not to resell at less than specified minimum prices. It cannot now justly complain because it is not free to use and impair the goodwill of General Electric by selling the bulbs at a price less than it agreed to maintain.

"* * * Contracts or agreements convey the idea of a co-operative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing. * * *" 19 A. L. R. 2d at 1129.

No provision of the act impinges upon §§ 1 and 11, Constitution of Virginia, or upon the Due Process clauses of the Fifth and the Fourteenth Amendments to the Constitution of the United States.

It was also held in *Old Dearborn* that the non-signer provision did not constitute arbitrary or special legislation infringing upon the Equal Protection clause of the Fourteenth Amendment because it represented a reasonable classification as between trade-marked and unmarked goods.

It appears that not only does the present Virginia act clearly meet the conditions required by *Old Dearborn* for constitutional validity (state and federal), but by elimination of the "non-signer" provision and substitution of the provision that permits the voluntary contractual restriction on minimum resale price to be agreed upon by the manufacturer or distributor and retailer, it has removed the chief ground and reason relied upon by courts that have held Fair Trade Acts to be unconstitutional.

With the "non-signer" provision eliminated, and upon the authority of *Old Dearborn*, we have no difficulty in holding that the act is not in violation of the Constitution of the United States.

Standard's next contention is that the act delegates power to private persons in violation of § 40 of our Constitution. This constitutional provision ordains that the legislative

power shall be "vested in a General Assembly. * * *" A statute delegating this power to private persons violates this provision and is invalid. In *Board of Supervisors* v. *State Milk Comm.*, 191 Va. 1, 4, 60 S. E. 2d 35, 37, quoting from *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835, it is said: " 'Delegation to official agencies is one thing, * * * delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different." Of like effect is *Chapel* v. *Commonwealth*, 197 Va. 406, 89 S. E. 2d 337.

By the Virginia Fair Trade Act no one or more persons are given authority to fix generally the price of any commodity. Not even the manufacturer of a commodity bearing his trade-mark is given the power to fix the retail price of the commodity in the hands of one who acquired it without a pre-existing restriction on its use or disposition. Here the restriction imposed by the manufacturer or producer was agreed to by the retailer when, with full knowledge of the restriction, he acquired and accepted the flashbulbs. No compulsion is practiced and no retailer is bound except by his own agreement.

What was said in *Old Dearborn* is dispositive of the contention that the act violates §40. It follows:

"* * * It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made." (At page 192.)

Does the Fair Trade Act violate §63(18)[2] by creating arbitrary and unreasonable classifications? This section of our Constitution has been construed and applied in numerous decisions. *Martin's Ex'rs* v. *Commonwealth*, 126 Va. 603, 102 S. E. 724; *Joyner* v. *Centre Motor Co.*, 192 Va. 627, 66 S. E. 2d 469; *Green* v. *County Board*, 193 Va. 284, 68 S. E. 2d 516; *Finance Corp.* v. *Londeree*, 200 Va. 607, 106 S. E. 2d 760.

In *Joyner* v. *Centre Motor Company*, *supra*, we quoted with approval *Martin's Ex'rs* v. *Commonwealth* and said at page 632:

" 'A law is "special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from those upon which, but for such separation, it would operate." ' (126 Va. 610)

"Reasonably satisfactory as that definition is, we must still, in each instance, determine if the Act makes an 'arbitrary separation' of 'persons, places or things.' For as stated by Judge Kelly at p. 610 in *Martin* v. *Commonwealth*, *supra*, whether there has been such an 'arbitrary separation * * * must in the nature of things depend upon the person [purpose] and subject of the particular act and the circumstances and conditions surrounding its passage.' "

Section 59-8.3 classifies commodities that bear or the label or container of which bears the trade-mark or trade name of the producer or distributor and which are in free and open competition with commodities of the same general class produced by others. An article or commodity which bears

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[2] "The General Assembly shall not enact any local, special or private law in the following cases:

* * *

18. Granting to any private corporation, association or individual any special or exclusive right, privilege or immunity."

the brand or trade-mark of the manufacturer or distributor represents and embodies the goodwill of the manufacturer or producer.

For the purpose of this litigation it may be said that the "goodwill" of the manufacturer or producer is that intangible property right or asset created in the public mind by the skill, experience, dependability and integrity of the manufacturer or producer of the commodity, and the trade-mark or trade name is the symbol of those qualities and constitutes an inseparable part of the goodwill. It is a valuable aid to the growth and enlargement of the business. The owner or proprietor of the goodwill symbolized by his trade-mark is entitled to protection in his property right, and it cannot now be doubted that commodities bearing and identified by the trade-mark, brand or name of the producer or distributor that are in free and open competition with commodities of the same general class are proper subjects of legislative classification. This was decided in *Old Dearborn* when it was said:

"* * * As this court many times has said, the equal-protection clause does not preclude the states from resort to classification for the purposes of legislation. It only requires that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' * * *

"* * * Enough appears already in this opinion to show the essential difference between trade-marked goods and others not so identified. * * *" (At page 197.)

We find no merit in the contention that the title of this act does not meet the requirements of § 52, which declares

that "No law shall embrace more than one object which shall be expressed in its title; * * *."

The title, among other things, states that it is an act to permit any producer or distributor to prescribe minimum resale prices of a commodity bearing the trade-mark, brand or name of the producer or distributor that is in free and open competition with commodities of the same class. It also notifies the reader that the act defines terms, provides for the giving of notice of the minimum resale price and declares that intentional violation is unfair competition. Undoubtedly this title states the object of the act and is sufficiently clear to apprise the public and members of the legislature of the subject of legislation and give them notice of the purpose and contents of the act. *Town of Narrows* v. *Giles County*, 128 Va. 572, 105 S. E. 82; 82 C. J. S., Statutes, § 219, p. 364; 50 Am. Jur., Statutes, § 166, p. 146.

Section 165 of the Constitution is a direction to the General Assembly to enact legislation preventing trusts, combinations and monopolies inimical to the public welfare. Standard asserts that §§ 59-20 and 59-40, Code 1950, as amended, referred to herein as the Anti-monopoly Act, implement the constitutional provision, and that they are in conflict with the Fair Trade Act. It is then argued that as they implement the mandatory section of the Constitution, they should prevail over the later enacted Fair Trade Act. With this last contention, that the former amendment should prevail over the latter act, we cannot agree.

Section 165 is not self executing, nor does it undertake to define or declare what shall constitute trusts, combinations or monopolies inimical to the public. It leaves that to the wisdom of the General Assembly. It is evident that since enactment of the first Fair Trade Act in 1936, that body has considered that agreements between manufacturers of

trade-marked commodities and retailers of such articles establishing minimum retail prices do not create combinations or monopolies inimical to the public welfare. This is made doubly plain by the re-enactment of the Fair Trade Act subsequent to Judge Young's decision in *Benrus Watch Co., Inc.* v. *Kirsch, supra*, and by the legislative declaration of policy and purposes in § 59-8.9. Among other things, it is there declared that the act is "to further wholesome competition, to prevent monopoly, and to promote the public welfare. * * *"

If the Fair Trade Act of 1958 be, as asserted by Standard, in irreconcilable conflict with §§ 59-20 and 59-40, which we need not and do not determine, yet under familiar rules of statutory construction, the latter enactment, *i.e.*, the Fair Trade Act of 1958 would prevail.

"'Repeal by implication is not favored and the firmly established principle of law is, that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each.' *Scott* v. *Lichford*, 164 Va. 419, 422, 180 S. E. 393, 394. *Danville* v. *Ragland*, 175 Va. 27, 7 S. E. (2d) 121.

"But if a later statute does not by its terms or by necessary implication repeal entirely a former one *in pari materia*, yet if it clearly appears that the later statute was intended to furnish the only rule to govern a particular case, it repeals the former to that extent. And in deciding that question 'the occasion and the reason of the enactment, the letter of the act, the context, the spirit of the act, the subject matter and the provisions of the act, have all to be considered.' *Fox* v. *Commonwealth*, 16 Gratt. (57 Va.) 1, 10. * * *"

American Cyanamid Co. v. *Commonwealth*, 187 Va. 831, 841, 48 S. E. 2d 279.

If the sections of the Anti-monopoly Act that were enacted prior to the 1958 Fair Trade Act be in conflict with the latter act, then the former sections would be repealed *pro tanto* or insofar as they are in conflict with the Fair Trade Act. 17 M. J., Statutes, §§91, 96; *American Cyanamid Co.* v. *Commonwealth, supra.*

Standard insists that the Fair Trade Act is in conflict with the Sherman Anti-Trust Act and void because the Virginia Act is in restraint of trade by authorizing price fixing without a voluntary agreement or contract of any kind.

We are mindful that in defining the term "contract", the first sentence of §59-8.2(10) says " 'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or container thereof." Obviously *actual notice* imparted by mail or attached to a commodity, without more, is not a contract. We are confident that the legislature did not mean that the mere notice attached to the commodity constituted a contract between the manufacturer and retailer. Nor are we limited to this single sentence defining "contract" in determining the legislative intent. We may and should look to other pertinent and explanatory parts of the act. 17 M. J., Statutes, §§41, 42, and 43. Interpretation of the legislative meaning and intent may be obtained by considering the second paragraph of subsection (10) and §59-8.3. When that is done, it is quite obvious that the notice is the offer to make a contract. Acceptance of the commodity for resale with notice attached stating its minimum retail price constitutes *prima facie* evidence of actual notice to the retailer of the imposed minimum resale price; acceptance with *actual* notice of the minimum

resale price is deemed assent to the terms imposed in the notice. Voluntary acceptance of the commodity with actual notice of the imposed minimum retail price creates the contract.

In 1911 the Supreme Court decided in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. ed. 502, that a contract between a manufacturer of a commodity and a retailer fixing the price at which the commodity was to be sold to the public was an unlawful restraint of trade at common law, and where interstate commerce was involved, it violated the Sherman Anti-Trust Act (26 Stat. 209, ch. 647, 15 U.S.C.A. §§1-7).

Subsequent to this the *Old Dearborn* case (1936) held that the Illinois Fair Trade Act, containing a non-signer provision was valid as applied to *intrastate* commerce.

In 1937 the Miller-Tydings amendment to the Sherman Anti-Trust Act (50 Stat. 693, 15 U.S.C.A. §1) was passed, which exempted from the provisions of the federal act contracts prescribing minimum prices of trade-marked commodities in intrastate commerce if the laws of the state so permitted. Then in 1951 *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 71 S. Ct. 745, 95 L. ed. 1035, held that enforcement of the price arrangement against a non-signer violated the Sherman Act since only *voluntary* minimum price arrangements were excepted by the Miller-Tydings amendment.

The McGuire Act (1952) (66 Stat. 632, 15 U.S.C.A. §45(a)) in amending the Sherman Act exempted from the prohibitions of that Act the non-signer provisions of state fair trade laws. This amendment has been held constitutional in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Cir. 1953); cert. denied,

346 U. S. 856, 98 L. ed. 369; rehearing denied, 346 U. S. 905, 98 L. ed. 404 (1953).

Standard argues that the McGuire Act exempts from the Sherman Act only statutes binding non-signers to observe minimum resale prices specified in contracts or agreements of which they have knowledge. It maintains that the Virginia Act does not fall within the terms of the exemption because the term "contract" as defined by the Act is no contract, but merely a stipulation by the seller made a "contract" by legislative fiat regardless of assent by the buyer. In short, Standard asserts and argues that the law authorizes price fixing without contractual agreement of any kind, and thus it is in conflict with the Sherman Anti-Trust Act and void.

We cannot agree with this contention and analysis of the pertinent acts. Here there is no legislative price fixing: the restriction against selling the trade-marked goods at less than a specified minimum price is limited to voluntary agreements. The challenged provisions of §59-8.2(10) are not compulsory, but merely permissive and evidential. The entire agreement made between the manufacturer of the trade-marked commodity and the retailer, embodying the restriction as to its minimum retail price, is not imposed by law; it is voluntary, and the agreement constitutes a contract within the meaning of the pertinent federal and state legislation.

For the reasons stated, the declaratory judgment of the trial court is affirmed.

Affirmed.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 28th day of November, 1960.

Record No. 5136

STANDARD DRUG COMPANY, INCORPORATED,
Plaintiff in Error,

v.

GENERAL ELECTRIC COMPANY,
Defendant in Error.

UPON A WRIT OF ERROR TO A JUDGMENT RENDERED BY THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND ON THE 27TH DAY OF AUGUST, 1959

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be, and the same is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages, and also its cost by it expended about the defense herein.

Which is ordered to be certified to the said Law & Equity Court.

Defendant in error's costs:

Attorney's fee	$50.00
Printing brief	40.00
	$90.00

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 16th day of January, 1961.

STANDARD DRUG COMPANY, INCORPORATED,
Plaintiff in error,

v.

GENERAL ELECTRIC COMPANY,
Defendant in error.

UPON A PETITION TO REHEAR

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 28th day of November, 1960, and grant a rehearing thereof, the prayer of the said petition is denied.

CHAPTER 259

An Act to permit any producer or distributor to prescribe minimum resale prices of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others with certain exceptions; to define terms; to provide for the giving of notice of such minimum resale prices; to declare that wilful and knowing violation by a party who has received notice of such minimum resale prices is unfair competition, and a wrongful interference with property rights; to provide for the relief thereof, and thereby to foster the preservation of small business, to protect the goodwill of trade-marks and trade names, to further competition, to prevent monopoly and to promote the public welfare.

[H 323]

Approved March 8, 1958

Be it enacted by the General Assembly of Virginia:

1. § 1. This act may be known and cited as the "Fair Trade Act".

§ 2. The following terms, as used in this act, are hereby defined as follows:

(1) "Commodity" means any subject of commerce, except meat and meat products, meal, flour, bakery products, fresh and canned fish, sea food, fresh and canned fruits and vegetables, coffee, tea, ice, sugar and wearing apparel.

(2) "Wearing apparel" means the finished product or

article and does not include any material, ingredient, or component out of which wearing apparel is made, altered, or repaired.

(3) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.

(4) "Distributor" means any person who identifies a commodity distributed by him by the use of his trade-mark or trade name.

(5) "Wholesaler" means any person who buys a commodity for the purpose of resale.

(6) "Retailer" means any person selling a commodity to a consumer for use.

(7) "Trade-mark" means any word, name, symbol or device, or any combination thereof used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(8) "Trade name" means personal names, and any word, words, symbol, or symbols used by producers or distributors to identify their companies, firms or corporations.

(9) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization.

(10) "Contract" means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof.

The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be prima facie evidence of actual notice of the terms of the "contract". Acceptance for resale with actual notice shall be deemed to be assent to the terms of the "contract".

§ 3. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark or trade name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;

(b) That the buyer will require of any dealer to whom he may resell such commodity a contract that he will not, in turn, resell at less than the minimum price stipulated by the seller;

Provided, however, that no such contract shall be permitted unless it further contains the provisions that the seller will not sell such commodity in this State:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

§ 4. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract, except to the extent authorized by the contract, the following instances shall be deemed a violation of such

resale price restriction, for which the remedies prescribed by § 7 shall be available:

(a) The offering or giving of any article of value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever, whether by the giving of coupons or otherwise, in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity.

Nothing contained in this section shall be construed as prohibiting the giving of "premium stamps", the furnishing, supplying or use of which may be taxed under Article 10.1, Chapter 7, Title 58, of the Code of Virginia, as amended.

§ 5. No minimum resale price shall be established for any commodity by any person other than the owner of the trade-mark or trade name used in connection with such commodity or a wholesaler specifically authorized to establish such price by the owner of such trade-mark or trade name.

§ 6. No contract containing any of the provisions enumerated in § 3 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer, distributor, or wholesaler, as the case may be, of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(c) By any officer acting under an order of court.

§ 7. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract is unfair competition and is actionable at the suit of any person damaged thereby.

§ 8. This act shall not apply to any contract, agreement, or understanding between or among producers or distributors or,except as provided in subdivision (b)(1) of § 3, between or among wholesalers, or between or among retailers, as to sale or resale prices. Nor shall this act apply to any sale of a commodity to the Commonwealth of Virginia, or an agency thereof, a political subdivision, a county, city or town, or a religious, charitable or educational institution.

§ 9. This act is enacted in the exercise of the police powers of the Commonwealth, and its purposes are generally to protect and preserve small business, to safeguard the goodwill of trade-marks and trade names, to further wholesome competition, to prevent monopoly, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the Commonwealth.

§ 10. If any one or more sections, paragraphs, sentences, clauses, phrases or parts of this act, or the application thereof to any person or circumstance, shall be adjudged invalid,

such judgment shall not affect, impair or invalidate the remaining applications or provisions thereof, but shall be confined in its operation to the specific provision or application held invalid, and the inapplicability or invalidity of any section, paragraph, sentence, clause, phrase or provision of this act in one or more instances or circumstances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.